

California v. Black
California Court of Appeals
UNPUBLISHED, 2004 WL 2051380
September 15, 2004

Summary of Opinion

The defendants Black, husband and wife, were convicted of felony animal cruelty in the deaths of two horses and the poor health of three horses. Each received a sentence of incarceration. They argued the jury should have been given the option of convicting them of misdemeanor cruelty, but the Court of Appeals said that on the facts of this case the only choices for the jury were to find them guilty of felony cruelty or not guilty of any offense.

Text of Opinion

On February 24, 2003, an information was filed in the Superior Court of Fresno County charging appellants Phillip and Mary Elizabeth Black with counts I through VI, felony cruelty to an animal (Pen.Code, § 597, subd. (b)). Appellants pleaded not guilty.

On July 11, 2003, appellants' joint jury trial began. On July 17, 2003, the court granted appellants' motion to dismiss count VI. On July 18, 2003, they were convicted of counts I through V.

On August 15, 2003, the court held the joint sentencing hearing. As to Mary Elizabeth Black, the court denied probation and imposed the lower term of 16 months in prison for count I, with concurrent terms of 16 months for counts II through V. As to Phillip Black, the court also denied probation and imposed the midterm of two years for count I, with concurrent terms of two years for counts II through V, and an additional concurrent term of two years for his unrelated prior conviction of infliction of corporal injury to a spouse (§ 273 .5, subd. (a)).

On the same date, appellants filed timely notices of appeal.

INTRODUCTION

On May 6, 2002, officers from the Fresno County Society for the Prevention of Cruelty to Animals (SPCA) impounded three horses from appellants. The horses were emaciated, malnourished, and suffering from numerous infections and illnesses. Appellants were convicted of five counts of felony cruelty to animals, based on the three horses that were impounded and two horses that had died on the property. On appeal, appellants contend their multiple concurrent sentences should have been stayed pursuant to section 654. Mr. Black separately contends the trial court had a sua sponte duty to instruct on misdemeanor animal neglect as a lesser included offense.

The Horses

Appellants lived on Highway 245 in Squaw Valley and kept six horses on their property. The record is not clear as to the exact age of each horse, but all the horses were quite old and their ages ranged from 16, 20, 30 to 47 years old. A brief history of the animals involved in this case follows:

Appellants purchased Chief in July 2000. Doll was an Appaloosa mare, also acquired by appellants in July 2000.

Cinnamon was a brown gelding pony, originally purchased by Mary Black 16 years previously when the horse was six months old. Appellants subsequently sold the horse. On May 4, 2001, appellants repurchased Cinnamon for \$5 at a livestock auction; Cinnamon was then lame in one leg and lacked an eye. After the SPCA impounded the horses, Cinnamon was renamed Charlie.

Appellants purchased two horses in a package deal for \$150 at a private auction on March 17, 2002: Sundae, a white mare, and Holly, an Appaloosa mare. The seller told appellants that Holly was 46 or 47 years old. After the SPCA impounded the horses, Sundae was renamed Angel.

Caramel was a brown Appaloosa mare with a white face. Appellants purchased Caramel at a livestock auction for \$5 on April 4, 2002.

The SPCA's Investigations

In November 2001, the SPCA received a complaint about a dead horse on appellants' property. Officer Keith Pagett went to the property and found the charred remains of a horse. This horse was later identified as Chief. Officer Pagett closed the case and did not conduct any follow-up investigation because it was impossible to determine the horse's cause of death.

On April 17, 2002, Officer Donny Williams of the SPCA responded to the same property regarding a complaint about dead and starving horses. Officer Mathias of the Sheriff's Department joined Officer Williams. They entered the property and went to the house, and contacted appellants Phillip and Mary Elizabeth Black. Officer Williams advised appellants of the complaint. Mr. Black seemed agitated and said that other people had complained about the horses. Mrs. Black appeared levelheaded and knowledgeable about the horses, and said she had a degree in horse care. Mrs. Black further stated there was horse feed on the property and veterinarians had been there to check the horses. Officer Williams asked for documentary proof that a veterinarian had been there, but Mrs. Black did not have any bills or statements.

Mrs. Black allowed Officer Williams to walk around the property and look at the horses. There were four horses on less than one acre of pastureland.

"[The h]orses were thin. They were responsive but not energetic. They were responsive and ambulatory but not to the extent that you would want to see them running in a healthy environment. They had pretty much decimated all the vegetation [*sic*] within their paddock or surrounding area they were living in. And as far as the conditions, I would say they needed to be upgraded quite a bit."

The horses were eating while Officer Williams was there. They had "some" food and water, "[n]ot the best, but it was there." Williams saw six bales of hay. The horses' eyes were inflamed and they appeared to have upper respiratory infections.

Officer Williams found two dead horses on the property. Chief's burned and decaying remains were still there. Williams also found another dead horse, which was Caramel. Mrs. Black stated the horses had met their "demise" and there was no way to remove the remains from the property.

Officer Williams decided not to impound the horses that day because of the amount of feed on the property and Mrs. Black's professed knowledge about horses. Williams advised Mrs. Black the horses needed professional care and should be checked by a veterinarian. Mrs. Black declined Williams' offer of assistance and assured him that a veterinarian was going to check the horses. Officer Williams decided not to issue a violation notice.

About one week later, Officer Williams received several more complaints about the condition of appellants' horses, and that there was another dead horse on the property.

On April 24, 2002, Officer Williams returned to the property for a follow-up investigation. He found three dead horses: the charred remains of Chief, the remains of Caramel, and the remains of a third horse, which was the recently-deceased Holly. The three surviving horses were Cinnamon, Doll, and Sundae.

Officer Williams again spoke with Mrs. Black, and she insisted they had enough hay, alfalfa, and feed for the animals. Officer Williams saw three bales of hay. The horses were eating and in fair condition. The water trough was full but needed cleaning. Williams did not check Mrs. Black's supplies but gave her the benefit of the doubt. Williams again decided not to issue a violation notice to appellants because if "I couldn't verbally tell [Mrs. Black] what needed to be done, and with her knowledge of horses to bring these horses up to snuff, a piece of paper is not going to do it. There was no need."

"Like I testified, Mary Black herself proclaimed she has a degree in horse care. The notice of violation wouldn't have done any good. She knows what needed to be done. She didn't need me to give her a piece of paper with her knowledge of horses."

Officer Williams also decided not to impound the horses until a veterinarian checked the animals and confirmed Williams' suspicions about their conditions.

The Veterinarian's Examination

On May 1 or 2, 2002, Officer Williams was contacted by the health department regarding the dead horses on appellants' property.

On May 3, 2002, Officer Williams returned to appellants' property, accompanied by a sheriff's deputy and Dr. Jesse Deux, a veterinarian. Williams asked Dr. Deux for his professional opinion about some horses that he believed were being abused, but did not give Dr. Deux any specific information about appellants or the horses. Appellants were not home. Officer Williams and Dr. Deux found the three horses were still alive; the bodies of the three dead horses were still on the property, in various states of decomposition.

Officer Williams testified the surviving horses had lost more weight since his previous visits, and they appeared very weak and sickly. They were kept in a paddock surrounded by barbed wire, wooden pallets, and exposed "nails." The enclosure was filled with mud and manure. The food was very sparse and spread on top of the fecal matter in the paddock. The water in the trough was very low and green, smelly, and bug infested.

Dr. Deux testified "the thing that struck me right away was the smell. It was a very bad smell of gray water, decayed matter." The paddock was made from "makeshift pallets and barbwire. It was unsafe and dangerous," and a large section was occupied by thorn bushes with stickers but no green vegetation. The water trough was "close to being empty," and the bottom was "more like putrid green slimy mosquito infested—I don't know what you want to call this, but it's definitely not drinking water" for "any creature that I know of."

Dr. Deux testified the three decomposing carcasses were "disgusting" and "a hazard" to the surviving animals because of the maggots and flies. Chief's charred carcass was on another portion of the property, but the rotting remains of Holly and Caramel were near the paddock, and represented a threat to the health of the surviving horses. Dr. Deux determined the two dead horses, other than Chief, had been extremely emaciated and could have died from malnutrition. Dr. Deux inspected the ground around one of the dead Appaloosa horses, and observed markings in the dirt "clearly representative of a horse that has struggled on the ground unable to get up but flailing with his legs, front legs and back legs, head, in the last struggle before he died." Dr. Deux testified that a horse in such distress should have been put down by an SPCA officer, a law enforcement officer, a veterinarian, or "anybody that carries a permit for a gun."

Dr. Deux testified the three surviving horses were in "very poor health." The horses were standing still in the paddock, they "did not even budge" when approached, they did not have the energy to move, and they were "extremely depressed." Cinnamon had eye infections and maggots. Sundae/Angel, the white horse, was over 25 years old, malnourished, and starving to death. Doll, the Appaloosa mare, had

bloody skin infections, chronic internal infections, severe eye infections, and both of her eyes were semi-closed because of ulcerated lesions and fly maggots. Dr. Deux testified the horses were mentally and physically suffering, and he believed the horses' conditions were so severe that they were "going to die on the spot."

Dr. Deux initially recommended the horses be euthanized because of their dire condition. An SPCA officer rejected this opinion and advised Dr. Deux the horses were going to be taken care of soon.

The Impoundment

On May 6, 2002, Officer Williams obtained veterinarian reports from Dr. Charlene Hagus regarding her treatment of appellants' animals. Williams reviewed the records and was not satisfied that appellants were properly caring for the horses.

On the same date, Officer Williams returned to appellants' property and impounded the three surviving horses for neglect. Officer Williams testified he decided to impound the horses because the veterinarian's records were insufficient, appellants failed to conform to the veterinarian's requirements, there were reports from neighbors that appellants were riding the lame and sick horses, and the horses' continued to deteriorate.

Williams gave appellants the appropriate notices after impounding the horses. Williams repeatedly asked appellants for any receipts or documents as to feed and veterinary care, but they never gave him anything. Mrs. Black wanted to get the horses back, and was concerned if she could have any horses in the future.

Dr. Deux assumed responsibility for Cinnamon, Doll, and Sundae, and the horses were transported by trailer to his clinic. All three horses immediately responded to treatment for their numerous infections, insect infestations, eye tumors, malnutrition, severe arthritis, hoof problems, and other ailments. Their hooves were untrimmed and needed treatment for thrush caused by lack of hoof care and standing in unsanitary water.

Dr. Deux began by hand-feeding the animals a small amount of hay to avoid "diseases associated with refeeding any anorexic emaciated animal." The horses "obviously seem[ed] to regain a lot of life as soon as they knew they were going to be fed." Within one week, all the horses began to gain weight. In one month, Sundae/Angel gained 150 pounds and her eye infections cleared up. Cinnamon/Charlie already lacked one eye. The other eye suffered from an untreated disease and was almost destroyed, but responded to treatment and the simple provision of a fly mask over the surviving eye so he could see shadows. Doll, the Appaloosa and the youngest horse, recovered from severe infections and put on the most weight. Despite Dr. Deux's efforts, however, Sundae/Angel died about six months later from an unrelated epileptic seizure.

Additional Prosecution Evidence

Dr. Deux testified the severity of the three surviving horses' suffering was "either deliberate or negligent," and he had never seen this type of long-standing neglect. It would have taken "months" for the horses to get into this condition. Even if the horses had been in poor condition when purchased, appellants' conduct contributed to the horses' illnesses and malnutrition.

Dr. Deux testified that horses may live to be quite old, depending on their general health and what type of life they've had. When a horse is close to 20 years old, however, it essentially becomes a geriatric patient and must be properly fed and cared for. An Appaloosa typically lives longer because they are tough horses. In California, people cannot sell horses to slaughterhouses, and old and sick horses generally are sold at livestock auctions for a very small fee.

Dr. Deux testified if he had been called by appellants to visit their property and treat the horses, his fee

would have been \$250 to cover "basic start-up treatment," including "the trip, the exams, the medications. Then of course, it's—it would be on the minimal treatment which allows the owner to have refills and so forth and so on, come pick them up." The cost for additional treatments would have depended upon "how well the treatments are done, owner compliance about doing the treatments, the horse compliance about having the treatments done. There's a lot of variables there. But the first three months I would say you would spend \$100 a month on all three of them. That—I would say that would be the most you would have to spend," that is, \$100 per month to continue treatment for the three horses.

Dr. Deux testified that it did not appear the horses had received any veterinary care, or were being cared for by someone who was a horse trainer or knowledgeable about horses. Such an individual would know the basic requirements of equine care. In addition, there were over-the-counter treatments available at tack shops that would have alleviated the suffering of these horses.

Also at trial, Officer Williams testified the SPCA had been dealing with appellants for over 15 years regarding prior complaints from neighbors about animal cruelty. In 1992 and 1996, there were multiple complaints about Mrs. Black's mistreatment of dogs when she lived in the City of Fresno. There were also complaints in August 2000 about appellants' treatment of the horses in Squaw Valley. Officer Williams had not been satisfied with Officer Pagett's decision to close the case after finding the charred remains of Chief in November 2001.

Lee McComb, appellants' neighbor, also testified at trial. Ms. McComb lived across the road from appellants' property. She had filed several complaints with the SPCA against appellants because of their dogs. She also called the SPCA when she found the charred remains of Chief on the property, "and the smell of it was horrendous from where we lived."

Ms. McComb noticed appellants' horses were often standing in deep mud, had nothing to graze on except for old blackberry bushes, and noticeably deteriorated over time. "These horses, they didn't look good." The "white one"—Sundae/Angel—"looked bad" when appellants obtained it, and "it continued to look bad. It was skinny. And I would say it lost weight once it was up there because there's nothing to eat." In the winter of 2002, Ms. McComb observed appellants and their daughter riding the horses with full saddles, about five to 10 miles down the hill to the post office. "The people of the community felt kind of badly. I felt badly, obviously, because the horses didn't look like they were in good enough condition." Ms. McComb particularly noticed the "white horse"—Sundae/Angel—staggering as Mrs. Black's daughter rode it.

Ms. McComb testified the horses became skinnier over time, and "didn't look this bad to start with." Ms. McComb once observed Mr. Black working on a horse's hoof: "And older horses are just like older people. They aren't steady on their feet. He was trying to ... Mr. Black started beating on the horse. I almost called in that day. I felt really bad about it. He picked up the hoof again and beat on it a little bit when he took it away." Ms. McComb believed the SPCA took too long to intervene and impound the horses.

Defense Evidence

Appellants' defense was that the horses were in ill health and poor condition when they obtained possession of the animals, the horses' previous owners were responsible for their conditions, the horses actually gained weight under their care, and appellants did their best to improve the horses' health.

Both appellants, Phillip and Mary Black, testified. Mrs. Black had a college degree in animal husbandry, once ran a 100-acre ranch, and always worked with horses. Mr. Black had worked with horses since he was a child, and later worked with numerous riding stables and as a licensed groom at racetracks. He also worked with Ringling Brothers, Barnum and Bailey circus as an animal handler in

the horse division, under Gunther Gabel Williams and Mark Oliver Williams. Mr. Black admitted he was convicted of felony spousal abuse in May 2000.

Appellant Mary Black testified the six old horses were thin when they purchased them, but the horses gained weight under their care. Phillip Black similarly testified their horses were sick because of the treatment given by previous owners, but insisted the horses improved under their care. Mrs. Black testified the horses were sufficiently fed with hay, grain, and alfalfa. Dr. Hagus and Dr. Graves had been their veterinarians. Dr. Hagus warned appellants not to ride the horses until they were sound and a certain weight. At some point, Dr. Hagus refused to treat the horses anymore because of complaints from the neighbors. Mrs. Black contacted Dr. Deux's office, but someone from the office asked about the horses' value and he refused to look at them. Mrs. Black finally hired Dr. Graves, who said there was no reason not to ride the horses. Mrs. Black was never advised that Sundae or Doll could not be ridden, and she took Sundae on slow walks. Mr. Black denied that he hit Sundae or any other horse.

Appellants testified Doll and Chief improved so much that they were leased to the Kings Canyon pack station in 2001, even though the horses were over 20 years old. Mrs. Black denied the pack station returned the horses because they were old and ill. However, she admitted that Chief died three days after it was returned by the pack station. Mr. Black testified Chief died because he was "the age where he just didn't want to live any longer."

Mrs. Black conceded that Officer Williams' photographs depicted exposed nails in the horses' paddock, but explained the horses knocked down the wooden pallets and exposed the nails. "You make it with what you have where you live when you have a limited income. I did the best I could with the resources I had. The pallets were put up to make individual feeding stalls." Mr. Black clarified the nails were actually screws, which became exposed when the horses knocked down the pallets. He didn't have time to repair the paddock because he was involved in his own court case and complying with the terms of probation.

Appellants conceded some of the horses had eye infections, but Mrs. Black used an over-the-counter medication recommended by Dr. Hagus until she ran out of the medication on April 16, 2002. Mr. Black explained:

"... With the finances we had, we were checking in with—going to tack shops and stuff like that looking at medicines that we could afford. And we were in the process of trying to find a wholesale vet store that we could go to and buy our medicines...."

Mrs. Black also conceded there wasn't any hay on the property when the horses were impounded on May 6, 2002. She had gone to town to purchase feed but her daughter called and told her about the impoundment, and she didn't purchase any supplies. She also conceded the water trough was dirty because they hadn't cleaned it since March, but it was too heavy to move and they tried to clean it out monthly.

Both appellants were on total disability. Mrs. Black testified it cost \$400 to \$500 per month to care for the horses, and she cared for the horses to the best of her ability. Sometimes she was unable to obtain veterinary care for the horses because of financial problems, but "[n]obody went without feed." "The humans are the ones that got on the short end of the stick." Mrs. Black disagreed with Dr. Deux's opinion about the condition of the horses when they were impounded, particularly his belief the horses never received proper veterinary care for their numerous infections and illnesses. Mrs. Black claimed a veterinarian was "scheduled to come out May 7th," the day after the horses were impounded. Mrs. Black insisted Dr. Deux didn't know "what the heck I was doing. He made no attempt to go through and find out anything about those animals at all. I am sorry that some of the ones I'd gotten were older. I am sorry." Mrs. Black conceded that she based her calls to the veterinarian on their schedules and "when my money comes in."

Mrs. Black also testified about the three horses that died on the property:

"We had got—the ones about to die, one had a bullet hole in her chest. We thought she got helped by a neighbor. One fell down a flight of stairs—down the mountainside because the night before she died, she was up wandering the pasture. And Chief, he got down, but we knew he was old. But he was at 1000 pounds the day he died."

Mrs. Black testified Holly had a bullet hole in the chest, and she suspected a neighbor shot it. Mrs. Black insisted the flies, maggots, and illnesses suffered by the surviving horses were the result of the dead carcasses remaining on their property. She was unable to find anyone to haul the bodies off the land, and testified that the government prevented them from having the horses removed: "We were in the new National Monument. We were told by the Federal Government when the animal died, we had to let mother nature handle it."

Mr. Black similarly testified one horse died because of a gunshot wound, and another horse died when it wandered away, fell down a hill, and broke its neck. He disputed Dr. Deux's interpretation of the marks in the dirt near the dead horse which fell down the hill. The marks represented the horse's failed attempts to get up, not that it was in the midst of long-term suffering. They were unable to find someone to haul away Chief's body, decided to cremate it to get rid of the smell, and obtained a burn permit from the Department of Forestry.

Both appellants disputed Ms. McComb's allegations about the conditions of the horses. They had problems with Ms. McComb, "a lady that can't be trusted," because of a dispute about their dogs. Mrs. Black also denied that she rode the horses while they were ill or underweight. Appellants believed the SPCA harassed them because of their neighbors' complaints. In retrospect, however, Mr. Black conceded that he should not have purchased these horses, but they tried to give the animals a loving home and place of rest.

Appellants were initially charged with six felony counts of animal cruelty: three counts for the dead horses, and three counts for the three surviving horses that were impounded. The court granted appellants' motion to dismiss the single count based on Chief, the horse that died and was cremated in November 2001, because Dr. Deux was unable to determine the animal's cause of death. Thereafter, appellants were convicted of the remaining five felony counts. Phillip Black was sentenced to the midterm of two years, Mary Black was sentenced to the lower term of 16 months, and the court imposed concurrent terms for the rest of the counts.

On appeal, appellant Phillip Black contends the court should have instructed the jury on lesser included offenses. Both appellants contend the court improperly imposed concurrent terms, and instead should have stayed the terms pursuant to section 654.

DISCUSSION

I.

LESSER INCLUDED OFFENSE INSTRUCTION

Appellants were tried and convicted of five counts of felony animal cruelty in violation of section 597, subdivision (b). Appellant Phillip Black contends the trial court had a sua sponte duty to instruct on misdemeanor animal neglect, in violation of section 597f, as a lesser included offense to each of the charged crimes. Appellant asserts section 597f is a lesser included offense of section 597, subdivision (b) under either the statutory elements or the accusatory pleading test. Appellant Mary Black has not raised this issue.

A trial court has a sua sponte duty to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 154, 162.) "Under

California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117; *People v. Breverman*, *supra*, at p. 154, fn. 5.)

Appellants were charged with five felony violations of section 597, subdivision (b), which imposes criminal penalties on "whoever, having the charge or custody of any animal ... subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather...." Section 597f states the misdemeanor offense of animal cruelty:

"(a) Every owner, driver, or possessor of any animal, who permits the animal to be in any building, enclosure, lane, street, square, or lot, any city, city and county, or judicial district, without proper care and attention, shall, on conviction, be deemed guilty of a misdemeanor...."

In *People v. Speegle* (1997) 53 Cal.App.4th 1405, defendant argued the jury should have been instructed on misdemeanor animal neglect, in violation of section 597f, as a lesser included offense of each of multiple counts of felony animal cruelty, in violation of section 597, subdivision (b). Defendant claimed the pleading alleged the felony offense in such a way that, if committed in the manner alleged, the misdemeanor was necessarily committed as well. (*People v. Speegle*, *supra*, at p. 1416.) *Speegle* agreed:

"... As the present information alleged inadequate provision of shelter, food, drink, and sustenance (all of which are aspects of care) and the infliction of 'needless' suffering (which does not appear to be anything other than a synonym for 'unjustified'), the acts alleged as constituting the section 597 felony are identical to the acts which constitute the section 597f misdemeanor." (*People v. Speegle*, *supra*, 53 Cal.App.4th at p. 1416.)

Speegle further noted, however, the mental state for both offenses is criminal negligence, and the misdemeanor offense is lesser only in terms of penalty. As such, the jury's choice was between conviction and acquittal rather than a greater offense and a lesser offense. *Speegle* concluded the trial court did not have a sua sponte duty to instruct on section 597f as a lesser included offense of the charged crimes. (*People v. Speegle*, *supra*, 53 Cal.App.4th at pp. 1416-1417.)

In the instant case, appellants were tried based on five identical counts, which alleged appellants committed the crime of cruelty to an animal, on or about March 1, 2002 through May 6, 2002, that they "did unlawfully torture, torment, and/or deprive of necessary sustenance, drink, and/or shelter, and/or subjected an animal to needless suffering, that animal being a horse." As in *Speegle*, the information alleged acts which are identical to those which constitute the section 597f misdemeanor: the only way appellants were guilty of the misdemeanor offense was through their failure to feed, care, or provide a proper environment for the horses. Since both offenses have the same mental state of criminal negligence, the jury's choice was between conviction or acquittal instead of a greater or lesser offense. There was no middle ground here. If the jury believed appellants' claim that they were properly caring for the horses and the animals were improving, they were not violating either section 597, subdivision (b) or section 597f. The court thus was not obliged to instruct on section 597f as a lesser included offense.

II.

THE CONCURRENT TERMS

[Discussion omitted.]

